

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MICHAEL CLARK,

2:09-CV-2338 JCM (PAL)

Plaintiff,

V.

OFFICER GALVAN,

Defendant.

ORDER

Presently before the court is defendant officer Rene Galvan's motion to dismiss/motion for summary judgment. (Doc. #29). Plaintiff Michael Clark filed an opposition. (Doc. #33). Defendant filed a reply. (Doc. #34).

17 Also before this court is defendant's motion for leave to file Exhibit B-1 *in camera* (doc.
18 #28) and notice of *in camera* submission (doc. #31).

19 Plaintiff filed his complaint (doc. #1-1) in the Eighth Judicial District Court of the State of
20 Nevada on October 26, 2009. Defendant removed the action to this court on December 10, 2009.
21 (Doc. #1). Plaintiff was an inmate at the Southern Desert Correctional Center when he was allegedly
22 burned while being pushed in a cart that was hot from being left out in the sun. (Doc. #33). He
23 asserts that when defendant Galvan operated the cart, he acted with deliberate indifference to
24 plaintiff's health or safety. In the present motion to dismiss (doc. #29), defendant contends that
25 dismissal is appropriate because (1) plaintiff failed to exhaust administrative remedies available to
26 him, (2) plaintiff failed to state a cognizable action under 42 U.S.C. § 1983, and (3) defendant is
27 entitled to qualified immunity.

1 **Motion For In Camera Submission**

2 To support his motion (doc. #29), defendant asks this court for leave to file Exhibit B-1 (doc.
 3 #30-1), plaintiff's one page medical record, *in camera*. Pursuant to NRS 629.061 and Administration
 4 Regulation 639 (doc. #28-1 Exhibit A), prisoner medical records are confidential documents, and
 5 are treated as such to protect the prisoner's confidentiality. The inmate may waive this, but a waiver
 6 of this sort has not been provided by the plaintiff. Defendant seeks to file plaintiff's medical records
 7 (doc. #30-1) *in camera* to "prevent their entry into the public record and to protect [p]laintiff's
 8 confidentiality." (Doc. #28).

9 As plaintiff may not possess copies of his records in his cell pursuant to Administrative
 10 Regulation 639, defendant asserts that he will send copies to the correctional center where plaintiff
 11 is housed, with instructions to permit the plaintiff to review the exhibit by appointment. (Doc. #28).
 12 In the notice of *in camera* submission (doc. #31), the defendant gives notice to the court that Exhibit
 13 B-1 (doc. #30-1) was submitted *in camera*, and that it was sent to the Northern Nevada Correctional
 14 Center for plaintiff to view by contacting the warden's office. In order to maintain the confidentiality
 15 of plaintiff's medical records, this court is inclined to grant the defendant's motion for leave to file
 16 the exhibit *in camera*.

17 **Motion To Dismiss**

18 In the defendant's motion to dismiss (doc. #29), he provides the court with a factual history
 19 of the case, including the events that occurred on the day of the incident and with regards to filing
 20 grievances with the prison officials. Defendant asserts that the complaint should be dismissed
 21 because, among other reasons, plaintiff failed to exhaust all of the administrative remedies as
 22 required under 42 U.S.C. § 1997e(a).

23 When a prisoner is seeking relief under § 1983, such as here, he must prove that he has
 24 exhausted all available administrative remedies prior to bringing suit. *See* 42 U.S.C. § 1997e(a).
 25 Exhausting all the administrative remedies is mandatory, and the requirement must be met prior to
 26 filing the complaint, not in conjunction with or after the filing of the complaint. *See Booth v.*
 27 *Chumer*, 532 U.S. 731, 741 (2001) (overruling *Rumbles v Hill*, 182 F.3d 1064 (9th Cir. 1999));

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1 *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002). In order to exhaust his remedies, the
 2 prisoner must comply with all of the prison system's procedural rules, including "deadlines and other
 3 critical procedural rules." *Woodford v. Ngo*, 548 U.S. 81, 89-96 (2006). Additionally, the prisoner's
 4 grievance must afford the prison officials a full and fair opportunity to address the prisoner's claim
 5 before a suit is filed. *Id.* at 90, 93.

6 In Nevada, a prisoner satisfies this requirement when he follows the procedures set forth in
 7 Administrative Regulation 740 (doc. #29-2 Exhibit A-1), which requires one formal and two
 8 informal levels of review. To implicate a first and second level review, a prisoner must file an appeal
 9 to an informal and first level grievance, respectively. *Id.*

10 Here, as evidenced by the inmate issue history (doc. #29-4 Exhibit A-2), plaintiff filed an
 11 informal grievance alleging that he was "burned four times on a steel plate cart that was not put in
 12 the shade." In response to the grievance, plaintiff was asked to specify when the incident occurred
 13 and to propose a remedy. *Id.* However, instead of complying with the request, plaintiff tried to appeal
 14 to the first formal level of review. *Id.* As this was the improper step to take, he was informed that
 15 he must wait for an informal response before proceeding to the next level. *Id.* Despite this, he failed
 16 to comply again by filing another separate informal grievance. *Id.*

17 In his new grievance, he expanded on his first allegation, and asserted that he was burned
 18 four or five times more because the officer rushed off before he was seated, and proposed that an
 19 apology and \$700 for pain and suffering would suffice as a resolution. *Id.* Plaintiff still failed to state
 20 the officer's name in his new grievance, and it was returned with a request for the disclosure of the
 21 officer's name. *Id.* Once again, rather than complying with the request, plaintiff attempted to appeal
 22 to both the first and second levels of review. *Id.*

23 As defendant contends, this does not amount to an exhaustion of remedies as required by 42
 24 U.S.C. § 1997e(a). Plaintiff did not follow the procedures, none of the appeals were accepted by the
 25 Nevada Department of Corrections, and there was no adjudication of the issues on the merits. *Ngo*,
 26 548 U.S. at 90-91. Plaintiff's failure to exhaust all administrative remedies warrants dismissal. 42
 27 U.S.C. § 1997e(a). Defendant provides the court with alternative reasons why dismissal is
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1 appropriate, but as the court dismisses plaintiff's complaint for failure to exhaust, it need not address
2 the additional grounds for dismissal.

3 Accordingly,

4 IT IS HEREBY ORDERED ADJUDGED AND DECREED that defendant officer Rene
5 Galvan's motion for leave to file Exhibit B-1 *in camera* (doc. #28) be, and the same hereby is,
6 GRANTED.

7 IT IS FURTHER ORDERED that defendant's motion to dismiss/motion for summary
8 judgment (doc. #29) be, and the same hereby is GRANTED.

9 IT IS THEREFORE ORDERED that the above captioned case be DISMISSED without
10 prejudice against defendant officer Rene Galvan.

11 DATED May 9, 2011.

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13 **UNITED STATES DISTRICT JUDGE**
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